NO. 88-1949

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

NAN YA PLASTICS CORPORATION U.S.A.,

Petitioner,

v.

PHILIP R. DeSANTIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED

1. In a suit brought for breach of an employment contract, does it violate the Due Process Clause of the Fourteenth Amendment to exercise *in personam* jurisdiction over a defendant who has no assets, no employees and no business operations in the forum state, and whose only connection to the forum state was that its agents had placed telephone calls and written 2 letters to offer Plaintiff a job in another state?

2. May Virginia courts, consistent with the Due Process Clause of the Fourteenth Amendment, premise *in personam* jurisdiction over a defendant in a breach of contract action on their conclusion that the contract was executed in Virginia, even though no agent of the defendant ever came to Virginia?

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ASSIGNMENT OF ERROR

1. The trial court's refusal to quash the process issued against Defendant Nan Ya Plastics Corporation, U.S.A., for lack of personal jurisdiction violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. (1257(3), in that a violation of the United States Constitution is alleged.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No state shall . . . deprive any person of life, liberty or property, without due process of law. . .

U.S. CONST. AMEND. XIV.

STATEMENT OF THE CASE

On April 3, 1985, Plaintiff Phillip DeSantis sued Defendant Nan Ya Plastics Corporation, U.S.A.[1] for $350,000.00 for breach of an employment contract. Service was obtained under Virginia's long-arm jurisdiction statute, Va. Code Ann. (8.01-328.1, by mailing to the Secretary of the Commonwealth, who in turn mailed the Motion for Judgment to Nan Ya. Nan Ya filed a Motion to Quash Service, alleging insufficient contacts

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[1]Nan Ya Plastics Corporation, U.S.A. is affiliated with Formosa Plastics Corporation, U.S.A.; Formosa Plastics Corporation, Delaware; Formosa Plastics Corporation, Louisiana; Formosa Plastics Corporation, Texas; Formosa Plastics Development Corporation; Format Corporation; J-M Manufacturing Company, Inc.; Neumin Production Company; Lavaca Pipeline Company; and Formosa Hydrocarbons Company, Inc.

between Nan Ya and the Commonwealth of Virginia to sustain in personam jurisdiction in Virginia. The motion was based specifically on the Due Process Clause of the Fourteenth Amendment. The motion was decided on the basis of Admissions and testimony taken at a hearing on September 19, 1985. The motion was denied. No transcript was made of that proceeding, though the Order and Admissions reflect the facts necessary for the determination of the jurisdictional issue. DeSantis' trial testimony was essentially the same as his testimony at the jurisdictional hearing.

On March 20, 1986, the case was heard on the merits, and the judge of the Circuit Court for the County of Greene found that Nan Ya had breached its contract with DeSantis, and awarded

judgment for $73,766.22 for salary due to the date of trial, plus other expenses and minus an offset for wages earned to the date of trial, and further ordered that Nan Ya establish an account with certain fiduciary protections to guarantee the payment of $5,000.00 a month through March, 1989. (The total payout would have been approximately $250,000.00.) The Final Judgment order was entered on April 14, 1986.

Nan Ya appealed to the Virginia Supreme Court, on the basis that Virginia's assertion of in personam jurisdiction over Nan Ya violated the Due Process Clause of the Fourteenth Amendment and Va. Code Ann. (8.01-328.1. In its opinion of March 3, 1989, the Virginia Supreme Court affirmed in all

respects.[2] The Virginia Supreme Court has stayed execution on the judgment pending this Petition for Writ of Certiorari.

STATEMENT OF FACTS

The Parties

Defendant Nan Ya Plastics Corporation, U.S.A., is a Delaware corporation, with its principal offices in New Jersey and its manufacturing plant in Texas. It is the American subsidiary of a Taiwanese corporation, Formosa Plastics Corporation. Kloeckner Pentaplast of America ("KPA"), like Nan Ya, manufactures polyvinyl chloride products. Plaintiff Phillip DeSantis had been production

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[2]Nan Ya also assigned two errors of state law -- that DeSantis' own unclean hands estopped him from recovery, and that the trial court had miscalculated the damages due to DeSantis. The Virginia Supreme Court ruled against Nan Ya on all issues.

manager at KPA's plant in Gordonsville, Virginia, until his resignation in March, 1984. He had signed a Confidential Business and Technical Information Agreement prohibiting him from going to work for any direct competitor of KPA. Nan Ya and KPA are direct competitors; if the Agreement were enforceable, it would have prohibited DeSantis from working for Nan Ya.

The Job Offer

In February, 1984, Nan Ya needed a plant manager for the plant in Wharton, Texas, then under construction. Jules Pilcher, a salesman employed by Rocheaux International (which sells Nan Ya products), called DeSantis at DeSantis' home in Virginia to ask whether he would be interested in the job of plant manager at the Wharton plant. DeSantis was

interested and agreed to fly to Houston the next weekend. When he was in Texas, Y.L. Chang, the general manager of the Wharton plant, offered DeSantis the position of plant manager.[3] DeSantis insisted on certain conditions, to which Chang did not have the authority to agree. DeSantis returned to Virginia, but the next weekend again flew out to Texas, this time bringing his wife to look at houses. On March 9, 1984, Y.L. Chang sent a letter to DeSantis in Virginia, offering DeSantis the position as plant manager. DeSantis called Nan Ya and complained that certain terms were missing; on March 13, 1984, Chang sent DeSantis a second letter, setting forth all of the details of the

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[3]Nan Ya needed a plant manager immediately, because the plant was already being built.

agreement, including a five-year guarantee (on which DeSantis had been insisting). DeSantis then called Nan Ya and "acknowledged the fact that I received that and I would turn in my resignation." DeSantis testified that he regarded the contract as complete when he received the letter of March 13, 1984.

Within days, DeSantis turned in his resignation at KPA, and left for Texas and Taiwan. Within days after DeSantis began work at the Wharton plant, KPA filed suit in the United States District Court for the Eastern District of Virginia, (Kloeckner-Pentaplast of America Inc., v. DeSantis, Civil Action No. 84-317-R (E.D.Va.)), and Judge Robert Mehrige granted a temporary restraining order, later converted to an injunction, prohibiting DeSantis from working for Nan

Ya. Nan Ya was forced to fill the plant manager's position for which DeSantis had been hired. DeSantis lived in Texas while the case was pending, occasionally receiving money from Nan Ya, but not working. In December, 1984, Judge Mehrige found the restrictive covenant contained in the Agreement to be unenforceably overbroad, and he dissolved the injunction that had prohibited DeSantis from working for Nan Ya. Judge Mehrige continued the injunction that prohibited DeSantis from disseminating KPA trade secrets to Nan Ya, and he declined to dismiss the portion of KPA's claim that sought damages for dissemination of trade secrets.[4] Soon after Judge Mehrige's

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[4]That portion of the suit was eventually dismissed as well, but not until after suit had been filed in this case.

ruling, Nan Ya decided not to put DeSantis back on the payroll, for three main reasons:

1. There was no decision on the trade secrets question, and no clear idea of how long it would be before Nan Ya could know whether employing DeSantis would expose it to a potentially huge damage claim for trade secrets violations.

2. Nan Ya had not known about (or perhaps had not understood about) the Confidential Business and Technical Information Agreement, and Nan Ya was upset that DeSantis had admitted to having committed perjury during depositions in the case in the Eastern District of Virginia.

3. Someone else was already hired and doing DeSantis' job.

Soon after he was told in December, 1984, that he would not be returned to the payroll, DeSantis returned to Virginia and filed suit to recover his wages under the contract.

Facts Relating to Personal Jurisdiction

DeSantis admitted that:

1. Nan Ya is not a corporation licensed to do business in Virginia.

2. Nan Ya does not do business in Virginia.

3. Nan Ya does not own any property in Virginia.

4. No representative of Nan Ya came to Virginia in connection with the recruitment or hiring of DeSantis.

5. The only contacts between DeSantis and Nan Ya, other than his two

trips to Texas, were by telephone calls made or letters sent into Virginia from outside of Virginia.

6. The employment contract that is the subject of this litigation was to be performed in Texas.

7. The initial offer of employment was made to DeSantis while he was visiting in Texas.

8. The only contacts by Nan Ya that serve as the basis for the claim of Virginia jurisdiction are telephone calls and letters from agents of Nan Ya to DeSantis in February and March, 1984.

The trial judge decided that the letter of March 9, 1984, was an offer of employment, that DeSantis' response by telephone insisting upon additional conditions was a counteroffer, and the March 13th letter was the acceptance of

the counteroffer. He then concluded that the contract had been consummated in Virginia when the letter of March 13, 1984, was received in Virginia. Because the contract had been "made" by receipt of the acceptance in Virginia, the trial court ruled that there were sufficient contacts with Virginia to support Virginia jurisdiction.

Opinion of Virginia Supreme Court

Virginia's long-arm jurisdiction statute permits a Virginia court to exercise personal jurisdiction "over a person, who acts directly or by an agent as to a cause of action arising from the person's... [t]ransacting any business in this Commonwealth." Va. Code Ann. (8.01-328.1(A)(1). The long-arm statute has been interpreted as extending as far as the Due Process Clause of the Fourteenth Amendment

to the Constitution of the United States permits. Daniel Plywood Corp. v. Plain and Fancy Kitchens, Inc., 218 Va. 533, 534, 238 S.E.2d 800 (1977). Virginia's long-arm statute is a single-act statute. Kolbe, Inc. v. Chromodern, Inc., 211 Va. 736, 740, 180 S.E.2d 664, 667 (1971).

The Virginia Supreme Court based its finding a Virginia jurisdiction on its conclusion that "the employment contract was formed in Virginia." Slip op. at 7.

> The Plaintiff was located in Virginia when he participated in the telephonic negotiations, and written communications were sent to and received in Virginia. These letters were acknowledged by the Plaintiff in Virginia.
>
> More importantly, however, the employment contract was formed in Virginia. Plaintiff, after receiving the first March letter, expressly conditioned his acceptance of the job offer upon his receipt of assurances that a five-year guarantee would be part of his contract. He

> testified that he would not resign from his job at KPA until he "received that," meaning the promise of guarantee. The assurance of a guarantee was transmitted in the second March letter received in Virginia.

Slip op. at 7.

SUMMARY OF ARGUMENT IN FAVOR OF GRANTING CERTIORARI

Since International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), this Court has relaxed old restrictions on the assertion of in personam jurisdiction to permit the assertion of jurisdiction whenever a defendant has had "minimal contacts" with the forum state. The development of the law since International Shoe leads to some questions which this Court should address:

1. Before International Shoe, this Court had held that "mere solicitation" of a contract was not enough

of a basis for jurisdiction. If the only contact between the defendant and the forum state is the defendant's solicitation, but the state court has ruled that its rules of contract law deem the contract to have been executed within the state, does that state law rule confer jurisdiction?

2. Should this Court revisit Green v. Chicago, Burlington and Quincy Ry. Co., 205 U.S. 530, 27 S.Ct. 595, 51 L.Ed. 916 (1907), in light of the rules that have developed in post-International Shoe cases?

This Court has decided a number of jurisdictional cases in the last twelve years, and has applied post-International Shoe rules to, among others, products

liability actions[5], libel actions[6], and national franchising contracts[7]. However, this Court has not considered the jurisdictional problems involved in an interstate employment contract case, nor has it decided a case that offers much guidance to state and federal courts on how to decide jurisdiction in a case like the present case.

In this extremely mobile job market, in which employers advertise for

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[5]See Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

[6]See Keeton v. Hustler Magazine, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984).

[7]See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

employees nationally and it is not uncommon for employees to move from state to state to take new jobs, parties and courts must have guidance in determining the constitutional rules that determine where suits may be brought. Now, the lack of precedent relevant to the case of an employer who offers employment to someone living in another state has caused confusion and disparate results in the state courts that have addressed the issue. The opinion of the Virginia Supreme Court in this case conflicts with recent opinions of appellate courts in Iowa[8] and Oregon[9] in interstate employment cases, and with recent appellate decisions

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[8]Tung v. American University of the Caribbean, 353 N.W.2d 869 (Iowa App. 1984).

[9]Perkins v. Bartlett Construction Company, Inc., 57 Or.App. 817, 646 P.2d 672 (1982).

from California[10], New Hampshire[11], New York[12], Illinois[13], and Florida[14] in other marginal contract cases. This Court should grant certiorari not only to resolve the conflict among the states, but also to give guidance to lower courts in other related cases.

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[10]Walter v. Superior Court (Fischer), 178 Cal.App.3d 677, 224 Cal.Rptr. 41 (1986).

[11]Weld Power Industries, Inc. v. CSI Technologies, Inc., 467 A.2d 568, 124 N.H. 121 (1983).

[12]L.F. Rothschild, Unterberg, Towbin v. McTamney, 452 N.Y.S.2d 630, 89 A.D.2d 540, aff'd 463 N.Y.S.2d 197, 59 N.Y.2d 651, 449 N.E.2d 1275 (1982); Dulman v. Potomac Baking Company, Inc., 445 N.Y.S.2d 509, 85 A.D.2d 676 (1981); J.E.T. Advertising Associates, Inc. v. Lawn King, Inc., 443 N.Y.S.2d 745, 84 A.D.2d 744 (1981).

[13]Illinois National Bank and Trust Company of Rockford, Ill. v. Gulf States Energy Corp., 102 Ill.App.3d 1113, 429 N.E.2d 1301 (1981).

[14]Yale Industrial Products, Inc. v. Gulf Stream Galvanizing and Finishing, Inc., 481 So.2d 1304 (Fla.App. 1986).

This Court has repeatedly held that choice of law doctrines are not dispositive of jurisdictional issues. Kulko v. California Superior Court, 436 U.S. 84, 98, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978); Hanson v. Denckla, 357 U.S. 235, 254, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). The question of whether a contract is formed upon receipt of the letter that sets out its terms or upon placing the telephone call to confirm receipt of that letter may be an important choice of law question. But whether a state applies a "mailbox" rule is not a constitutional issue, and should not be dispositive of a constitutional question.

This Court should grant certiorari to make clear that the hair-splitting technicalities of choice of law doctrines do not control the fundamental

fairness inquiry of the due process clause.

Finally, Petitioner urges this Court to grant certiorari to reverse the erroneous decision of the Virginia Supreme Court. Plaintiff, who was living in Texas when he was allegedly improperly fired by his Texas employer, returned to Virginia, where his employer had no contacts, and filed suit for a cause of action that had accrued months before in Texas. The substantive law to be applied to the breach was Texas law. The only connection with Virginia in early 1985 was that Plaintiff had just moved back there.

Petitioner prays this Court to grant certiorari to consider whether a state can exercise in personam jurisdiction in a contract case over a defendant who has no assets, employees,

or business in the state, who has never been physically present in the state, and who would never be called upon to perform the contract in the state.

ARGUMENT

I

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE MODERN APPLICATION OF ITS LONG-STANDING RULE THAT MERE SOLICITATION OF A CONTRACT IS NOT ENOUGH TO GIVE IN PERSONAM JURISDICTION.

This Court has long held that the fact that a defendant has solicited a contract in a state does not itself confer in personam jurisdiction over that defendant. Green v. Chicago, Burlington and Quincy Ry. Co., 205 U.S. 530, 533-34, 27 S.Ct. 595, 51 L.Ed. 916 (1907); Philadelphia & Reading Ry. Co. v. McKibben, 243 U.S. 264, 37 S.Ct. 280, 61

L.Ed. 710 (1917). Since International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), emphasized the need for "minimal contacts", and Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), emphasized the need to focus on the defendant's actions rather than on choice of law issues, state court decisions on jurisdiction in routine contract cases have focused on highly technical issues:

1. Does the "mere solicitation" rule apply only to solicitation in which the defendant never physically enters the state[15], or does it also apply to cases in

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[15]In J.E.T. Advertising Associates, Inc. v. Lawn King, Inc., 443 N.Y.S.2d 745, 84 A.D.2d 744 (1981), a contract for advertising services was solicited, negotiated and entered into by telephone and mail, there were no meetings in New York, and the only New York activities relating to the contract were performed by the Plaintiff. The New York Court of

which the defendant was present in the forum state during part of the negotiation process[16]?

2. If "mere solicitation is not enough", is it enough that the contract has been deemed to have been executed in

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Appeals found that New York had no jurisdiction over the defendant. See also Bucks County Playhouse v. Bradshaw, 577 F.Supp. 1203 (E.D.Pa. 1983); Osage Homestead, Inc. v. Sutphin, 657 S.W.2d 346 (Mo.App. 1983).

[16]See Basler v. Nelson, 633 S.W.2d 491 (Tenn.App. 1982), in which preliminary negotiations took place in Tennessee, all further negotiations took place in West Virginia or North Carolina, and the construction contract was to be performed in West Virginia; the Tennessee courts found that there was no Tennessee jurisdiction. Likewise, Viers v. Mounts, 466 F.Supp. 187 (W.D.Va. 1979), held that telephone calls into Virginia and one visit into Virginia by the defendant as part of the contract negotiation process were not sufficient to confer Virginia jurisdiction.

the forum state[17]? Is it enough if the contract was executed by the defendant when he was physically present in the forum state[18]?

The Virginia Supreme Court in this case apparently decided that solicitation is enough if the contract is deemed tc have been executed in Virginia. In so doing, the Virginia Supreme Court elevated a technicality of state contract law to constitutional stature. Another federal court has found that Virginia's

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[17]A number of courts have held that the place of contract formation is not dispositive; see Yale Industrial Products, Inc. v. Gulf Stream Galvanizing and Finishing, Inc., 481 So.2d 1304 (Fla.App. 1986); Weld Power Industries, Inc. v. CSI Technologies, Inc., 124 N.H. 121, 467 A.2d 568 (1983).

[18]In Computer Horizons Corp. v. Knauer, 483 F.Supp. 1272 (S.D.N.Y. 1980), the fact that the defendant had come to New York to negotiate and sign the contract was dispositive.

long-arm jurisdiction statute cannot support jurisdiction if the act alleged to give Virginia jurisdiction can only technically be said to have transpired in Virginia. Davis v. Costa-Gavras, 580 F.Supp. 1082 (S.D.N.Y. 1984).

In the 1980's, contracts will often be solicited, negotiated and executed by telephone, mail and facsimile transmission, without either party having to leave his or her home. Applying the Virginia Supreme Court's "contract formation" analysis would have constitutional questions decided on often arbitrary principles and constitutionally insignificant factual differences. For example, if Phillip DeSantis had told Nan Ya that they should send him a letter setting forth all contract provisions, which he would countersign and return, the

contract might well have been deemed to have been accepted in Texas, where the countersigned letter would have been received.[19]

In the first part of this century, when the relevant precedents (Green v. Chicago, Burlington and Quincy Ry. Co., and Philadelphia & Reading Ry. Co. v. McKibben), were decided, interstate contract formation was the exception rather than the rule. This Court

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[19]When and where a contract is deemed to be formed may depend on whether the case is governed by the U.C.C. (see U.C.C. § 2-206), whether the contract is unilateral or bilateral (compare Petterson v. Pattberg, 248 N.Y. 86, 161 N.E. 428 (1928), and Lynch v. Webb City School District No. 92, 418 S.W.2d 608 (Mo.App. 1967)), or whether the forum state has adopted the First Restatement of Contracts (see §45) or the Second Restatement (see §66). Surely a constitutional question should not turn on whether a state appellate court has chosen to adopt the Second Restatement of the Law of Contracts instead of the First Restatement.

should grant certiorari to decide whether the old principles of Fourteenth Amendment law need to be reconsidered in light of the changing business world.

II

THE STATE COURTS ARE IN CONFLICT CONCERNING WHETHER A STATE COURT IN THE EMPLOYEE'S HOME STATE HAS JURISDICTION OVER A NON-RESIDENT EMPLOYER WHERE THE ONLY CONTACT BETWEEN THE EMPLOYER AND THE FORUM STATE WAS THE NEGOTIATION OF THE EMPLOYMENT CONTRACT IN LITIGATION.

The Virginia Supreme Court's opinion in this case is irreconcilably in conflict with appellate court decisions in Iowa, Oregon and California on indistinguishable facts, and with decisions from many other states presenting the same issue.

In Tung v. American University of the Caribbean, 353 N.W.2d 869 (Iowa

App. 1984), the Iowa Court of Appeals found that there were insufficient contacts to support Iowa jurisdiction over the American University of the Caribbean. Mr. Tung, and Iowa resident, had been looking for a job. The University, located in the British West Indies, sent a letter to Mr. Tung in Iowa, explaining the employment possibilities with the University. The parties had three telephone calls, and then met in Miami, Florida, to negotiate a contract. The University mailed the finalized contract to Mr. Tung in Iowa, where it was signed and returned to the University. The American University of the Caribbean had no other contact with Iowa. No representative of the University went to Iowa during the contract negotiations. The breach of contract that

gave rise to the litigation apparently occurred at the University's campus in the British West Indies.

The Court of Appeals emphasized in its decision that the University did not "send a representative to Iowa, maintain offices in Iowa, or conduct business in Iowa." 353 N.W.2d at 872. The Court noted:

> Iowa has only a minimal interest in this litigation. The contract was negotiated by an Iowa resident in Florida to be wholly performed outside the University. The plaintiff moved from Iowa and only returned to Iowa after the breach of that contract. This is not a case where an Iowa resident enters into a contract with a non-resident and remains an Iowa resident throughout the negotiation, signing, performance and breach of a contract. See Berkley International Co. Ltd. v. DeVine, 289 N.W.2d 600, 602 Iowa, 1980)(plaintiff was an Iowa corporation with its principal place of business in Iowa).

Id.[20]

What is most noteworthy about Tung, in contrast to this case, is that the Iowa Court of Appeals followed this Court's statement that it is the acts of the defendant, not abstract choice of laws doctrines, that determine whether a particular state has in personam jurisdiction over a defendant.[21] The Iowa

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[20]The Iowa Supreme Court recently held that the fact that an employment contract was made with an Iowa resident does not by itself confer Iowa jurisdiction over the defendant. See Cross v. Lightolier, Inc., 395 N.W.2d 844 (Iowa 1986).

[21]See Hanson v. Denckla, 357 U.S. 235, 254, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958): Florida did not acquire jurisdiction over the defendant "by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved by considering the acts of the [defendant]."

court did not worry about whether a "mailbox rule" meant that the contract was deemed to have been executed in Iowa when Mr. Tung signed the contract and mailed it back to the University. The Court of Appeals instead looked at the acts of the defendant.

The Court of Appeals of Oregon has taken the same approach. In Perkins v. Bartlett Construction Company, Inc., 57 Or.App. 817, 646 P.2d 672 1982), the Court of Appeals held that Oregon courts could not exercise jurisdiction over Bartlett Construction Company, Inc., concerning a contract of employment in which Bartlett hired Perkins to work in an oil drilling operation in Nigeria. The Court of Appeals rejected Perkins' contention that whenever an Oregon worker accepts employment outside of Oregon, the non-

resident employer is subject to the jurisdiction of the Oregon courts, finding that merely making the job offer is not enough to confer jurisdiction.

In an analogous case, the California Court of Appeal found insuffiicient contacts to support California jurisdiction. In Walter v. Superior Court (Fischer), 178 Cal.App.3d 677, 224 Cal.Rptr. 41 (1986), Max Walter was a widower living in New Jersey. Sylvia Fischer was Walter's deceased wife's sister. Fischer claimed that Walter, in a series of phone calls, persuaded her to move to New Jersey to be his "companion for travel, social and cultural events and to be his confidante." In return, Walter supposedly promised to support Fischer for the rest of her life, provide her with medical insurance, pay

her a large sum of money, and buy her a new car. Fischer claimed that, in reliance on those promises, she resigned her job and moved to New Jersey to live with Walter. The situation proved unsatisfactory, and Fischer returned to California.

Fischer sued, asking for what amounted to contract damages. The Court of Appeal ordered the process quashed, noting that Walter was a resident of New Jersey, did not do business in California, and did not even travel in California. The "contract" was not to be performed in California, and if it was in fact breached, the breach occurred in New Jersey, not in California. The fact that Fischer accepted the alleged offer while she was in California was insufficient, as was the fact that Walter supposedly called

Fischer "innumerable times over a period of months." Finally, the Court held that the fact that Fischer gave up her job and her apartment in California is irrelevant; "it is [Walter's] activity, and not that of [Fischer], which is the key element in the determination of jurisdiction." 224 Cal.Rptr. at 44.

Again, the Court of Appeal specifically rejected the choice of law arguments that the Virginia Supreme Court relied on in this case.

The Virginia Supreme Court's decision is in direct conflict with the indistinguishable opinions of the appellate courts of other states.[22] This

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[22]In addition to the cases discussed at some length in the text, recent decisions from courts in New Hampshire (see Weld Power Industries, Inc. v. CSI Technologies, Inc., 467 A.2d 568, 124 N.H. 121 (1983)), New York (L.F. Rothschild, Unterberg, Towbin v. McTamney, 452

Court should grant certiorari to resolve the conflict.

III

THIS COURT SHOULD GRANT CERTIORARI TO EMPHASIZE THE FACT THAT CHOICE OF LAW PRINCIPLES DO NOT GOVERN JURISDICTION QUESTIONS.

This Court has repeatedly held that choice of law doctrines are not dispositive of jurisdictional issues. Kulko v. California Superior Court, 436 U.S. 84, 98, 98 S.Ct. 1690, 56 L.Ed.2d 132

N.Y.S.2d 630, 89 A.D.2d 540, aff'd 463 N.Y.S.2d 197, 59 N.Y.2d 651, 449 N.E.2d 1275 (1982); Dulman v. Potomac Baking Company, Inc., 445 N.Y.S.2d 509, 85 A.D.2d 676 (1981)), Illinois (Illinois National Bank and Trust Company of Rockford, Ill. v. Gulf States Energy Corp., 102 Ill.App.3d 1113, 429 N.E.2d 1301 (1981)), and Florida (Yale Industrial Products, Inc. v. Gulf Stream Galvanizing and Finishing, Inc., 481 So.2d 1304 (Fla.App. 1986) are in conflict with the opinion of the Virginia Supreme Court, though not on similar facts.

(1978); Hanson v. Denckla, 357 U.S. 235, 254, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). The question of whether a contract is formed upon receipt of the letter that sets out its terms or upon placing the telephone call to confirm receipt of that letter may be an important choice of law question, but whether a state applies a "mailbox" rule is not a constitutional issue, and should not be dispositive of a constitutional question.

This Court, of course, has no interest in whether the Virginia Supreme Court correctly applied its own contract law to this case, or in whether the Virginia courts correctly found as a fact that the parties had agreed that the contract would be complete when the Plaintiff made his telephone call from his

home in Virginia to Nan Ya in Texas to accept the offered employment.

What this Court should care about is that the Virginia Supreme Court elevated a choice-of-law principle to a constitutional doctrine when it held that the only contact necessary to find Virginia jurisdiction was that the contract was deemed to have been executed when the Plaintiff made a telephone call from Virginia to Texas.

This Court should grant certiorari to make clear, particularly in light of the advent of modern means of contract formation, that the courts are not to apply hypertechnical choice of laws doctrines to the fundamental fairness inquiry of the Fourteenth Amendment.

IV

THIS COURT SHOULD GRANT CERTIORARI TO REVERSE THE VIRGINIA SUPREME COURT BECAUSE THE DECISION BELOW IS BOTH WRONG AND, IF FOLLOWED, DANGEROUS.

We have argued above that the decision of the Virginia Supreme Court is wrong. It is also dangerous.

To take a common, every-day example, let us suppose that a Virginia law firm places a telephone order to buy office supplies from an Illinois company, in response to a catalog solicitation. U.C.C. (2-206(2) provides that the law firm has made an offer, which is accepted by shipment of a conforming order from Illinois. Under the Virginia Supreme Court's analysis, the law firm could be sued on the contract in Illinois, even

though it may have had no contact with Illinois except to place a telephone call to an Illinois company.

This is a dangerous rule, one that could, if followed, wreak havoc. In this example, if the Virginia view were upheld, this distributor could sue all of its customers in Illinois and obtain valid judgments. It would be the Illinois company that has "purposefully availed itself" of the economic benefits of doing business in Virginia, rather than the Virginia law firm having "purposefully availed itself" of the economic benefits of doing business in Illinois.

This Court should grant certiorari and reverse to make clear that such an arbitrary rule of contract law does not comport with the due process requirement of fundamental fairness.

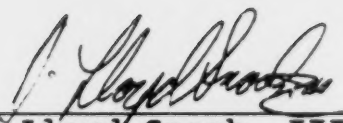
CONCLUSION

Philip DeSantis, who was living in Texas when he was allegedly improperly fired by his Texas employer, returned to Virginia, where his employer had no contacts, and filed suit for a cause of action that had accrued months before in Texas. The substantive law to be applied to the breach was Texas law. As has been argued above, the Virginia courts were in error in finding that they had in personam jurisdiction over Nan Ya. Even if this Court is not persuaded that this case has ramifications for litigants beyond the parties, this Court should grant certiorari and reverse simply because the Virginia Supreme Court was wrong. Nan Ya Plastics Corp. U.S.A., a Delaware corporation with offices in New Jersey and

a manufacturing plant in Virginia, with no employees, assets, or business operations in Virginia, should not have been made to defend itself in Virginia against a breach of contract action that arose in Texas. To require it to travel to Virginia to defend itself violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

NAN YA PLASTICS CORP. U.S.A.

By Counsel



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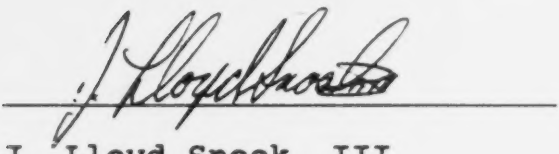
CERTIFICATE OF SERVICE

I, J. Lloyd Snook, III, a member of the bar of the United States Supreme Court, hereby certify under oath that on this 1st day of June, I mailed 40 copies of this Petition for Writ of Certiorari to the Clerk of this Court, first-class postage prepaid, and that I mailed the required number of copies to John Dezio, 410 E. Jefferson Street, Charlottesville, Virginia 22901, Counsel for Respondent.



J. Lloyd Snook, III

STATE OF VIRGINIA

AT LARGE

Sworn and acknowledged before me in the City of Charlottesville this 1st day of June, 1989, by J. Lloyd Snook, III, counsel for Petitioner Nan Ya Plastics Corporation, U.S.A.

Notary Public

My commission expires: June 9, 1992

PRESENT: All the Justices

NAN YA PLASTICS CORPORATION U.S.A.

V. Record No. 860635 OPINION BY JUSTICE A. CHRISTIAN COMPTON
March 3, 1989

PHILIP R. DeSANTIS

FROM THE CIRCUIT COURT OF GREENE COUNTY
Henry D. Garnett, Judge Designate

This appeal stems from an action for damages brought by an employee against an employer for the alleged breach of an employment contract. First, we must decide whether the trial court properly exercised in personam jurisdiction over a foreign corporation under Virginia's long-arm statute. If we decide the jurisdictional question in favor of the plaintiff, we will examine issues of contract breach and damages.

In 1985, appellee Philip De Santis, a resident of Greene County, filed a motion

for judgment against appellant Nan Ya Plastics Corporation U.S.A. seeking recovery of $350,000.00 for breach of a 1984 employment contract. Nan Ya was a multi-national Delaware corporation doing business in Texas. Upon affidavit that Nan Ya had failed to appoint or maintain a registered agent in the Commonwealth, process was served upon the clerk of the State Corporation Commission as defendant's statutory agent for service of process, pursuant to Code (13.1-758(F).

Subsequently, defendant filed a motion to quash the service of process. After a hearing, the trial court denied the motion. Later, following a bench trial on the merits, the Court found in favor of the plaintiff and fixed damages accordingly. Judge E. Gerald Tremblay ruled on the motion to quash and Judge

Henry D. Garnett presided over the trial on the merits. We awarded defendant this appeal from the April 1986 judgment order.

The facts relevant to the jurisdictional issue mainly are undisputed. Where there was conflicting evidence, we will view the facts in the light most favorable to the plaintiff, according to settled principles.

The plaintiff had been employed since 1980 as production manager for Kloeckner-Pentaplast of America, Inc. (KPA), at its Gordonsville plant. The company dealt in the plastics industry, specifically with rigid polyvinyl chloride film. The plaintiff was experienced in that industry.

In February, 1984, Jules Pilcher, employed by Rocheaux International, the seller of defendant's products, contacted

plaintiff in Virginia from outside the State by telephone. Pilcher, a former co-worker with plaintiff at another company, asked plaintiff if he "would be interested in a plant manager's job for Nan Ya Plastics in the Wharton, Texas plant." Pilcher said he was calling on behalf of Nan Ya.

Pilcher telephoned plaintiff on several subsequent occasions on behalf of Nan Ya to arrange an appointment for a job interview in Wharton. Pilcher also arranged for the plaintiff to fly to Texas and provided the airline ticket which plaintiff obtained at the airport.

The plaintiff arrived in Houston, Texas, on February 26, 1984 where he was met by Pilcher and Noah Wong, another representative of Rocheaux. The three travelled by automobile from the Houston

airport for the interview in Wharton, a trip of about one hour and forty-five minutes.

At Wharton, the plaintiff met Y.L. Chang, the general manager of Nan Ya's Wharton plant. Present during the interview were Pilcher, Wong and Chang. Wong acted as interpreter for Chang. At the conclusion of the interview, "they" offered plaintiff "the position of plant manager" at a "price of $60,000." The Plaintiff declined the offer, and sked about "some guarantees, housing, moving expenses." Specifically, the plaintiff asked for a five-year employment guarantee. Chang was unable to agree to the demand for the guarantee without consulting Nan Ya's chairman in Taiwan.

The plaintiff returned to Texas the following weekend to tour the Wharton

plant. Change informed him that he had not "received verification" from Taiwan concerning the five-year guarantee.

Following plaintiff's return to Virginia, he received a letter from Chang dated March 9, 1984, mailed from Texas. In the letter, Chang offered plaintiff the "position as a Plant Manager in charge of production management of the Wharton Plant" at an annual salary of $60,000.00 plus other benefits. The plaitniff notified Nan Ya, by telephone through Pilcher and Wong, that the offer of the five-year guarantee was not contained in the letter and that he would not resign his position with KPA "until [he] received that."

Subsequently, the plaintiff received in Virginia a letter from Chang dated March 13, 1984, mailed from Texas.

Referring to the earlier letter, Chang wrote that "our company will offer you ... the position of Wharton plant manager... for a consecutive five (5) years." The letter also referred to other benefits offered by Nan Ya, including payment of moving expenses from Virginia to Texas. Upon receipt of the letter, the plaintiff telephoned either Chang or Pilcher, accepted the offer, and indicated that he would resign his position at KPA, a competitor of Nan Ya, and was sent to Nan Ya's headquarters in Taiwan for a period of training.

In the order denying the motion to quash service of process, the trial court recited the foregoing basic facts and found that the March 4 letter constituted an offer of employment. The court further found that the plaintiff's response to

that letter by telephone insisting "upon additional conditions" had the legal effect of a counter offer. The court also found that the March 13 letter constituted acceptance of the counter offer; that upon receipt of that letter in Virginia, "the contract between the parties was consummated in Virginia; and that this consummation of the contract was then verified by a telephone call from the Plaintiff in Virginia to the Defendant." Thus, the court ruled, "the Defendant had sufficient contact with Virginia and had acceded to the laws of Virginia," thereby giving the court in personam jurisdiction over defendant.

On appeal, defendant argues the trial court erroneously exercised jurisdiction over it. Defendant points to the uncontradicted evidence that Nan Ya did

not business in Virginia, maintained no registered agent in Virginia, had no employees in Virginia, owned no property in Virginia, and had no regular business contacts with anyone in Virginia. Defendant says the "only" contacts upon which plaintiff based his allegation of Virginia jurisdiction were the telephone calls from Pilcher to him and the letters of March 9 and 13. Furthermore, defendant contends the trial court erred when it ruled that the employment contract was formed in Virginia. Relying on the so-called "mailbox rule," defendant says that the contract was complete in Texas when the letter of March 13 was posted. We disagree with the defendant's contentions.

According to the long-arm statute, a Virginia court "may exercise personal jurisdiction over a person, who acts

directly or by an agent, as to a cause of action arising from the person's ...[t]ransacting any business in this Commonwealth." Code (8.01-328.1(A)(1). A "person," as used in the foregoing statute, includes a corporation "whether or not a citizen or domiciliary of this State and whether or not organized under the laws of this State." Code (8.01-328.

The function of our long-arm statute is to assert jurisdiction over nonresidents who engage in some purposeful activity in Virginia, to the extent permissible under the Due Process Clause of the Constitution of the United States. Danville Plywood Corp. v. Plain and Fancy Kitchens, Inc., 218 Va. 533, 534, 238 S.E.2d 800, 802 (1977). The Due Process Clause, however, protects a person's liberty intrest in not being subject to

the binding judgments of a forum unless he ahs "certain minimum contacts" within the territory of the forum so that maintenance of the action does not offend "traditional notions of fair play and substantial justice." International Shoe Company v. Washington, 326 U.S. 310, 316 (1945). See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985).

And, an examination of the history of litigation involving the limits placed by the Due Process Clause on the power of state courts to enter binding judgments against persons not served within their boundaries shows a "clearly discernible" trend "toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957).

> "In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." Id. at 222-23.

Because our statute speaks of transacting any business, it is a single-act statute requiring only one transaction in Virginia to confer jurisdiction on our courts. Kolbe, Inc. v. Chromodern, Inc., 211 Va 736, 740, 180 S.E.2d 664, 667 (1971). In Kolbe, the single business transaction occurring in Virginia consisted of procuring a purchase order from a Virginia corporation by the agent of a California manufacturer for the sale

and delivery of furniture to a North Carolina purchaser. In I.T. Sales, Inc., v. Dry, 222 Va. 6, 278 S.E.2d 789 (1981), the single transaction in Virignia involved the signing of an employment contract in Virginia, a contract which required the defendant to move to California. In both cases, we held that the defendant conducted a business transaction in this State that was sufficiently substantial to permit personal jurisdiction to be asserted under the long-arm statute. The present case is similar to Kolbe and I.T. Sales.

Nan Ya aggressively reached into Virginia and recruited a Virginia resident for employment elsewhere. The plaintiff was located in Virginia when he participated in the telephonic negotiations, and written communications

were sent to and received in Virginia. These letters were acknowledged by the plaintiff in Virginia.

More importantly, however, the employment contract was formed in Virginia. The plaintiff, after receipt of the first March letter, expressly conditioned his acceptance of the job offer upon his receipt to assurances that a five-year guarantee would be a part of his contract. He testified that he would not resign from his job at KPA until he "received that," meaning the promise of the guarantee. The assurance of the guarantee was transmitted in the second March letter received in Virginia. Under these circumstances, defendant's "mailbox rule" argument is not pertinent because the plaintiff required the letter of acceptance actually to be received as a

condition to the formation of the contract. Thus, the contract was not formed until the letter was received. See 1 Williston on Contracts (88, at 283 (3d ed. 1957). And the trial court properly so found when it stated that the contract between the parties "was consummated in Virginia" upon receipt of the March 13 letter.

Accordingly, we hold that the assertion of in personam jurisdiction by the trial court over the nonresident defendant for a cause of action arising from the consummation of the contract in Virginia between the plaintiff and the nonresident corporation was proper under the foregoing provision of the Virginia long-arm statute.

Turning to the merits of the breach of contract claim, we conclude that the

trial court's findings of fact control this phase of the case. Defendant's contention centers around the idea that, because plaintiff knowingly breached an agreement with KPA to assume employment with Nan Ya, the risk of plaintiff's continued employment with Nan Ya should be "apportioned," and that it "is unfair and inequitable" to require defendant to "suffer" for an alleged breach of tis contract of employment. Defendant states: "Whether characterized as in pari delicto, assumption of risk, or unclean hands, DeSantis should not be permitted to require Nan Ya to pay for his mendacity to KPA." In effect, resolution of the issue turns on the knowledge and conduct of Nan Ya with reference to an agreement between DeSantis and KPA. As we shall demonstrate, the facts, stated in the

light most favorable to the plaintiff, do not support defendant's contentions.

While plaintiff was employed by KPA, he was required to execute a Confidential Technical and Business Information Protection Agreement (hereinafter, the secrecy agreement). Generally, the secrecy agreement prohibited disclosure by the employee of certain confidential information. It also contained a prohibition against an employee rendering services for any competing organization for a period of two years after his termination of employment with KPA.

When the plaintiff arrive in Houston during his first trip to Texas, he initiated a discussion with Pilcher and Wong, Nan Ya's authorized representatives, about the secrecy agreement. The plaintiff was apprehensive about the

effect the agreement would have upon his employment with a competitor of KPA such as Nan Ya. The plaintiff had a copy of the agreement in his possession and Pilcher and Wong, during the long ride to Wharton, "said that they would look at it later." After the first interview with Chang, plaintiff gave Pilcher a copy of the secrecy agreement. According to plaintiff, Pilcher carried the document to another room where Wong was present. Later, they told plaintiff that a Virginia agreement would not "stand up" in Texas and that "we really wouldn't have any problems with it." Later that evening, during dinner, the secrecy agreement was discussed between Chang and Wong, in plaintiff's presence.

The plaintiff joined Nan Ya and left for Taiwan on March 28, 1984. Shortly,

KPA threatened legal action against both parties based on the secrecy agreement. In May 1984, a federal district court in Virginia entered a temporary restraining order at KPA's request enjoining DeSantis from "continuing in his employment with Nan Ya," from disseminating any confidential information, and from otherwise violating the secrecy agreement.

In June 1984, the federal judge enlarged the restraining order into a preliminary injunction, but permitted DeSantis to draw his salary from Nan Ya. Nan Ya continued to pay the plaintiff directly until June 30, 1984. According to the evidence, plaintiff was not discharged by Nan Ya in June but continued to live in Texas and drew a salary indirectly from nan Ya by payments made by

Pilcher, Wong, and Rocheaux; they ultimately were reimbursed by Nan Ya.

In December 1984, the federal judge entered an order vacating that portion of the preliminary injunction which enjoined DeSantis from continuing employment with Nan Ya. Thereafter, on December 11, 1984, plaintiff discovered that Nan Ya had terminated him. That action spawned the present lawsuit.

The trial court found that Pilcher and Wong were acting for Nan Ya, that Nan Ya had full knowledge of the secrecy agreement before plaintiff was hired, and that Nan Ya breached the contract of employment.

Defendant contends that it should not be liable to the plaintiff for breach of contract because plaintiff knowingly assumed the risk that KPA would obtain an

injunction, thereby making his employment with Nan Ya "impossible." As we have said, the factual findings of the trial court, amply supported by the evidence, make such an argument untenable.

"The burden of proof to establish excusable impossibility of performance of a contract is on him who asserts it." Paddock v. Mason, 187 Va. 809, 817, 48 S.E.2d 199, 203 (1948). As the trial court found, Nan Ya was aware of the details of the secrecy agreement from the very first time De Santis was interviewed in Texas. Armed with this knowledge, Nan Ya employed DeSantis, guaranteeing him employment for five years. Even after a temporary restraining order was entered barring plaintiff's employment with Nan Ya, it continued to pay him, directly or indirectly, until December. Given this

knowledge and conduct, we cannot say that the trial court erred in finding that defendant had failed to carry its burden to establish excusable impossibility; indeed, the facts show that Nan Ya is the party which bore the risk that an injunction might make it impossible for plaintiff to work for it.

Finally, defendant raises a question of damages. The trial court, enforcing the employment contract, awarded plaintiff judgment in the amount of $73,766.22, for salary up to the date of the March 1986 trial, and further ordered Nan Ya to pay the plaintiff $5,000 per month beginning April 1986 through March 1989. Nan Ya was ordered to place the sum of $180,000 with a fiduciary to guarantee the payments to DeSantis. Execution on the judgment order has been suspended pending appeal.

Defendant contends that, although the trial court allowed defendant credit for wages actually earned by DeSantis, the court erred in refusing to offset against salary due any amounts DeSantis was likely to earn in the future during the remaining term of the contract. We reject this contention. As the trial court found, the evidence to support this claim was based on "conjecture" and was purely speculative.

For these reasons, the judgment appealed from will be

Affirmed.